TORT AND ABSOLUTE LIABILITY — SUGGESTED CHANGES IN CLASSIFICATION

IT is proposed to suggest some changes in the prevailing classification and nomenclature of the outlines of substantive law upon the general subjects, (1) of so-called torts, and (2) of cases of "absolute" liability where there is neither contract nor fault. And the attempt will be made to do this uninfluenced by two causes: one, the phraseology and doctrine of the old law of procedure, especially the old law as to forms of action;[1] the other, legal fictions and fiction phrases.

We are not now attempting to suggest the alteration of the substantive law, but rather the alteration of the mode of stating and classifying legal doctrines relating to certain topics. It will not be here contended that the actual results (the final decisions) which are now usually reached by courts upon these topics are often incorrect. But it will be contended that, although these results are generally correct, yet the prevailing classification and nomenclature are antiquated and misleading, and that a restatement will promote ease and clearness of apprehension. It may be said that the arrangement of topics, the division of the law into various subjects, "constitutes no part of the law itself" ("does not affect the law itself"), and that hence questions of arrangement or classification are "not of prime importance."[2] But it is certain that a good arrangement of topics will make the law more easily comprehended by students and less likely to be misunderstood or misapplied by lawyers and judges.

We cherish no illusions as to the speedy adoption of any suggested changes in classification. Even if the best members of the profession are convinced of the correctness of a proposed new system, yet an immediate change from a former system is not likely. The

[1] In a later part of this article, we quote the emphatic assertions of Maitland and Salmond to the effect that the old forms of action still influence modern statements of the existing substantive law.

[2] See BISHOP, CONTRACTS, 2 ed., § 183, note 1; BISHOP, NON-CONTRACT LAW, § 1. And compare 2 AUSTIN, JURISPRUDENCE, 3 ed., 685.

"dislocation of established associations," the confusion incident to a transition period, the practical inconvenience of adopting a new arrangement of topics differing from that found in the leading textbooks, are all considerations calculated to retard, if not entirely prevent, a change. Some of the ablest and most original legal authors of the present day have, in effect, said that the object to be aimed at in legal classification is practical convenience, not logical or scientific order, and that changes from the existing arrangement or nomenclature should be made only for very weighty reasons.[3] But a grouping or arrangement of topics which is preferable from the point of view of "the index-maker or the practitioner" may not always be preferable "from the point of view of the jurist" who desires to go down to foundations. What may be called a juristic classification, based upon existing decisions may tend to remove difficulties and inconsistencies inherent in the hitherto established methods of arrangement. If so, it should at least be conspicuously mentioned in the textbooks as an alternative classification, and attention should be called to its advantages.

As to the views about to be set forth, no claim of originality is made. The suggested changes are based upon distinctions already recognized in some legal treatises. Our inquiry is, whether these distinctions should not be allowed more effect than has hitherto generally been the case, in the consideration of questions relating to legal nomenclature and classification.

The term "causes of personal action" is a very broad one, embracing a good deal of matter that cannot be classed under tort.[4] How has the law classified or divided causes of personal action (other than suits to obtain possession of specific articles of property), and what names have usually been given to the separate classes?

In recent times it has been commonly assumed that there are only two great divisions of causes of personal action, contract and tort, and that there can be no cause of personal action unless it can be classed under one of these two heads.[5] "No intermediate

[3] See *post*, quotations from Pollock and Salmond.

[4] While legislatures, or courts, may undertake to abolish forms of action, yet they cannot abolish distinctions between causes of action. In the nature of things such distinctions must continue to exist. See 2 ODGERS, COMMON LAW OF ENGLAND, 1245.

[5] See Lord Chancellor Haldane, in Sinclair *v.* Brougham, [1914] A. C. 398, 415.

class was known to the law of procedure."[6] In *Bryant* v. *Herbert*[7] the controversy arose under a statute making a distinction as to costs between actions founded on contract and actions founded on tort. Bramwell, L. J., said, page 390: "One may observe there is no middle term; the statute supposes all actions are founded either in contract or tort. So that it is tort if not contract, contract if not tort."[8]

At the present time we think it should be recognized that there are three great divisions of causes of personal action:

1. Breach of genuine contract.

2. Tort, in the sense of fault.

3. So-called "Absolute Liability" imposed by courts, where there is neither breach of genuine contract nor fault.[9]

Under this classification, the application of the term tort should be restricted to class 2.

The third class can be subdivided as follows: (*a*) Cases where recovery has heretofore been enforced in an action of tort; (*b*) cases where recovery has heretofore been enforced in an action of contract.[10]

What practical benefit from adopting the new classification and

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[6] HEPBURN, DEVELOPMENT OF CODE PLEADING, § 26. Compare Professor Maitland's note in POLLOCK, TORTS, 10 ed., 587–94, Appendix A.

[7] 3 C. P. Div. 389 (1878).

[8] By the present Pleading and Practice Act of Massachusetts, 1902, REV. LAWS, Ch. 173, § 1: "There shall be only three divisions of personal actions:

"First, Contract . . .

"Second, Tort, which shall include actions formerly known as trespass, trespass on the case, trover and actions for penalties.

"Third, Replevin."

The above is a substantial reënactment of a statute originally passed in 1851 (LAWS OF 1851, ch. 233, § 1) in accordance with the report of a very strong legal commission, of which Benjamin R. Curtis was chairman.

[9] Those who prefer an arrangement of the law based upon rights, instead of upon duties or liabilities, might substitute for "Absolute Liability" the phrase "Violations of Absolute Right," or "Infringements of Absolute Right." Rights and duties are very generally correlative to each other.

[10] We have said that the existence of the three divisions should be recognized "at the present time." Will their existence permanently continue? With a better idea of the essence of fault, will many cases now classed under 3 (*a*) be placed under 2? Will modern legislation (*e. g.*, the Workmen's Compensation Acts) have such an effect upon public and judicial opinion as to induce the courts to repudiate the modern common law doctrine that fault is generally requisite to liability, and go back to the ancient doctrine that an innocent actor must answer for harm caused by his non-culpable conduct? See 27 HARV. L. REV. 365–68, and later discussion in this paper.

nomenclature above suggested? What disadvantage, what practical harm, from continuing to use the old division and nomenclature?

Two considerations may be mentioned:

1. The separation into class 2 and class 3 (*a*), instead of including both classes under the general head of tort, will necessitate searching inquiry into the essence of fault as a ground of liability, and also an inquiry into the reasons of policy for imposing liability in the absence of fault. These questions have not hitherto received the attention which their importance deserves.

2. No useful definition of tort can be framed if that term is used to cover all the cases under all the sub-topics formerly enumerated under this general head; in other words, if tort is used as including not only class 2, but also class 3 (*a*). The insufficiency of previous attempts to define tort, when used in this sense, is admitted by good authorities.

If the above classification — the separation of causes of personal action into three divisions — is correct, why has it not been generally adopted at an earlier date? The answer is found in the history of the law.

Formerly the law of procedure almost monopolized attention, so that questions of substantive law received very scant consideration. The form of procedure was considered the principal thing, and the substantive law was viewed as a mere incident to procedure.[11] "The forms of action are given, the causes of action must be deduced therefrom."[12] "So great is the ascendency of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure."[13] Certain forms of personal action were recognized by the courts. A plaintiff had no remedy unless his case would fit into one of these forms.[14] The relief afforded under the Statute of Westminster II was "only partial."[15] Not only were forms of action rigid, but each procedural form contained its own rules of substantive law, which had grown up "independently of the law

[11] See 1 ENCYCLOPÆDIA LAWS OF ENGLAND, 2 ed., Pollock's Introduction, 4.

[12] MAITLAND, EQUITY AND THE FORMS OF ACTION, 300.

[13] MAINE, EARLY LAW AND CUSTOM, Eng. ed., 1883, 389.

[14] See MAITLAND, EQUITY AND FORMS OF ACTION, 298–99; ODGERS, PRINCIPLES OF PLEADING, 5 ed., 185–86; Sir F. Pollock, 11 HARV. L. REV. 424; Professor Bohlen, 59 U. PA. L. REV. 306; HEPBURN, DEVELOPMENT OF CODE PLEADING, § 21.

[15] See HEPBURN, DEVELOPMENT OF CODE PLEADING, 68, 24.

administered in other forms."[16] "There were rules relating to each form of action, but no general law of torts."[17]

Sometimes "old formulæ of actions were adapted to new cases by means of *fictions*."[18] But while the legal fiction may, for the time being, have "served a useful function," we agree with Professor Hepburn (§ 27) that "the price paid for it was very high." The use of fictions has (along with other bad results) constituted an obstacle to systematic classification of legal doctrines.[19]

Forms of action are now abolished in many jurisdictions; while in some others a few simple forms are substituted for the old ones. Yet the ideas and phrases connected with the old forms still exert an influence.

"The forms of action we have buried, but they still rule us from their graves."[20]

". . . The substantive obligations imposed by law are still influenced by the old forms."[21]

"Forms of action are dead, but their ghosts still haunt the precincts of the law. In their life they were powers of evil, and even in death they have not wholly ceased from troubling. In earlier days they filled the law with formalism and fiction, confusion and complexity, and though most of the mischief which they did has been buried with them, some portion of it remains inherent in the law of the present day. Thus if we open a book on the law of torts, howsoever modern and rationalized, we can still hear the echoes of the old controversies concerning the contents and boundaries of trespass and detinue and trover and case, and we are still called upon to observe distinctions and subtleties that have no substance or justification in them, but are nothing more than an evil inheritance from the days when forms of action and of pleading held the legal system in their clutches."[22]

Professor Wigmore calls attention to

"the necessity, every day drawing nearer, of adjusting the treatment of our substantive law to the abolition, already largely accomplished, of the forms of action and classes of writs in tort. . . ."[23]

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[16] See MAITLAND, 298. Compare Professor Williston, 24 HARV. L. REV. 415.

[17] Prof. Geo. D. Watrous, in TWO CENTURIES GROWTH OF AMERICAN LAW, 86.

[18] See HEPBURN, §§ 24, 25.

[19] "Now legal fictions are the greatest of obstacles to a symmetrical classification." MAINE, ANCIENT LAW, 1 Eng. ed., 27.

[20] MAITLAND, EQUITY AND FORMS OF ACTIONS, 296.

[21] ROBERT CAMPBELL, PRINCIPLES OF ENGLISH LAW, 425 (1907).

[22] Prof. John W. Salmond, 21 L. QUART. REV. 43.

[23] 8 HARV. L. REV. 209.

Professor Maitland says that now

"the attention is freed from the complexity of conflicting and overlapping systems of precedents and can be directed to the real problem of what are the rights between man and man, what is the substantive law."[24]

In the former days when substantive law was dominated by procedure,[25] the leading doctrines of substantive law were evolved very slowly; and this was especially true as to the subject of torts. In a very recent work, it is said that, in tort, "the generalizing process" "has as yet developed much less than in the corresponding department of Contract."[26]

Professor Burdick, speaking of a book published in 1720, says

"that the rules of English law relating to torts had not then been systematized, and that neither the bench nor the bar had any conception of a Law of torts."[27]

Judge Doe says:

"Formerly, in England, there seems to have been no well-defined test of an actionable tort. . . . There were precedents, established upon superficial, crude, and undigested notions; but no application of the general system of legal reason to this subject."[28]

In 1895 Judge Jaggard, in the Preface to his work on Torts,[29] says:

"Specific Torts were among the earliest subjects of judicial cognizance." "But only within very recent times has the process of generalization been applied to them."

In 1886 Sir Frederick Pollock, in the Introduction to the first edition of his work on Torts (after stating that "the purpose of this book is to show that there really is a Law of Torts, not merely a number of rules of law about various kinds of torts"), says:[30]

"It is not surprising in any case, that a complete theory of Torts is yet to seek, for the subject is altogether modern. . . . The really scientific treatment of principles begins only with the decisions of the last fifty years. . . ."

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[24] MAITLAND, EQUITY AND FORMS OF ACTIONS, 375.

[25] "During the period when the substantive law was controlled by the forms of procedure. . . . " Professor Corbin, 21 YALE L. J. 536.

[26] JENKS, DIGEST OF ENGLISH LAW, Book II, Part 3, Preface, p. xi.

[27] BURDICK, TORTS, 2 ed., 2.

[28] Brown *v.* Collins, 53 N. H. 442, 445 (1873).

[29] Pages v and vi.

[30] Page vii.

Elsewhere Pollock says:

"In England the general scope of the law of torts has never been formulated by authority, the law having in fact been developed by a series of disconnected experiments with the various forms of action which seemed from time to time to promise the widest and most useful remedies."[31]

So late as 1853 Dr. Joel P. Bishop, who had just achieved a high reputation as a legal author, could find no law-book publisher in the United States willing to bring out a book on the Law of Torts. The publishers all said "that there was no call for a work on that subject, and there could be no sale for it."[32]

As to the existing classifications and definitions of tort:

When courts and lawyers were professedly proceeding on the assumption that all causes of personal action (except contract) should be placed under the head of tort, what was the usual method of subdividing the various causes of action thus grouped under that general head?

Holland, using the term "wrongful acts" in its literal sense as including breaking of contract,[33] says:

"Wrongful acts may be, and are, classified on five different principles at least."[34]

To the five different methods of classification there enumerated, at least two more may be added.

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[31] 27 ENCYCL. BRIT., 11 ed., 64.

"But whether any definition can be given of a tort beyond the restrictive and negative one that it is a cause of action (that is, of a 'personal' action as above noted) which can be sued on in a court of common law without alleging a real or supposed contract, and what, if any, are the common positive characters of the causes of action that can be so sued upon: — these are matters on which our books, ransack them as we will, refuse to utter any certain sound whatever. If the collection of rules which we call the law of torts is founded on any general principles of duty and liability, those principles have nowhere been stated with authority. And, what is yet more remarkable, the want of authoritative principles appears to have been felt as a want by hardly anyone." POLLOCK, TORTS, 2 ed., 4, 5.

[32] BISHOP, NON-CONTRACT LAW, published in 1889, § 3, note 2.

[33] "To break a contract is an unlawful act, or in the language of Lord Watson in Allen *v.* Flood ([1898] A. C., at p. 96), 'a breach of contract is in itself a legal wrong.'" Lord Lindley, [1905] A. C. 253.

[34] HOLLAND, JURISPRUDENCE, 8 ed., 291–92.

Pollock says:

"The classification of actionable wrongs is perplexing, not because it is difficult to find a scheme of division, but because it is easier to find many than to adhere to any one of them."[35]

The two methods most frequently pursued were:

1. (Originally the sole method.) Classification according to the forms of action under which remedies were enforced. In effect, "a purely procedural classification."[36]

2. Classifying specific kinds of torts according to the nature of the right invaded or the nature of the harm inflicted.[37]

Various other methods were suggested, including a division according to the nature of defendant's conduct. This last method, if fully carried out, would result in separation into two distinct classes: (1) liability imposed on the ground of fault; (2) liability imposed in the absence of fault. But this method was not usually made prominent. The order in which particular torts were dealt with (at least in the earlier books) "is not made to depend upon the motive, intent, or state of mind of the wrongdoer."[38]

In very early times there was no occasion to discuss the essential elements of a tort or wrong. Wrong was then not essential to liability. It was enough that the defendant's conduct, although perfectly blameless, had occasioned harm to the plaintiff.[39]

Later it began to be suggested that in certain instances (in certain classes of cases) there was no liability unless there was fault. But even then there was very little inquiry as to the substantive law respecting the necessity of showing fault. The attention of the courts was mainly given to questions of procedure, *e. g.*, the scope of the old forms of action.

Leaving out of view the comparatively recent suggestion that the term "tort" should be confined to cases of actual fault, the situa-

[35] 27 ENCYCL. BRIT., 11 ed., 65.

[36] See BOHLEN, CASES ON TORTS, ed. 1915, Preface, iii.

[37] This may be a convenient method for arranging the order in which to consider specific subtopics. But it is not a division upon fundamental grounds. It does not call for a discussion of the reasons for actionability: or of the real essence of a tort. If courts are to use this as the only method of classification, they will not be so likely to inquire into the fundamental reasons for imposing liability.

[38] BURDICK, TORTS, Preface to First Edition. See POLLOCK, TORTS, 9 ed., 8; Edward Jenks, 26 L. QUART. REV. 166.

[39] See 27 HARV. L. REV. 239; 22 HARV. L. REV. 99; 59 U. PA. L. REV. 309. Compare 1 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 54.

tion (as set forth in books of good repute) may fairly be described as follows:

The term "tort," although originally synonymous with wrong, "has become specialized in its application" as a technical term in law.[40] "Tort," taken in its broad literal sense of wrong, would include wrongs which are exclusively subjects of criminal jurisdiction, also breaches of contract and breaches of trust. But instead of including these, its application in law has been restricted to certain classes of wrongs (other than mere breaches of contract) which give rise to an action for damages in courts of common law. Under, or by means of, actions of tort, the courts were accustomed to allow the remedy of pecuniary satisfaction "for invasions of the three elementary rights of civilized society — the right of personal liberty and security, the right of reputation, and the right of property."[41] But an action of tort was not a remedy under which *all* invasions of these rights could be a subject of recovery.

The definitions of tort hitherto commonly given are admitted to be unsatisfactory.[42]

Those definitions which are most frequently given are, in part, merely procedural; and, so far as they relate to substantive law, are of a negative character. It is now proposed to state various common definitions, to consider the objections to them, and to see whether the difficulties can be obviated by a different system of classification, resulting in a better definition.

The following are common definitions of tort:

"A tort is usually said to be 'A wrong independent of contract,' *i. e.*, the violation of a right independent of contract."[43]

[40] SALMOND, TORTS, 4 ed., 7, note 4. [41] CLERK & LINDSELL, TORTS, 6 ed., 4.

[42] Of course it is impossible to frame a short definition of tort whereby a lawyer can instantly solve all the legal questions arising upon any conceivable set of facts. To do this would require a full statement of legal rights and legal duties. In speaking of a definition of tort, we now have in mind only the framing of a general statement or outline, marking out the essential issues to be investigated. Thus, if the definition makes fault a requisite element, it is necessary to inquire in each particular case whether there has been a violation of some legal right or legal duty. But the definition of tort does not undertake to tell us what are the legal rights or duties in each particular case. Compare ADDISON, TORTS, 8 ed., 1.

[43] INNES, TORTS, § 6. And see titles to forms of declarations and pleas in the Common Law Procedure Act of 1852, 15 & 16 VICT., chap. 76; Schedule B, pp. 725, 727.

As to this definition, Judge Innes makes the following comment: ". . . the rights,

"A tort may be described as a wrong independent of contract, for which the appropriate remedy is a common law action."[44]

"A tort is an act or omission giving rise, in virtue of the common law jurisdiction of the Court, to a civil remedy which is not an action of contract."[45]

"A tort is a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages."[46]

"Now, a 'tort' in English law means, practically, any cause of action formerly recognized by the Courts of common law, not capable of being dealt with as a breach of contract."[47]

The foregoing propositions, so far as they profess to state any rules of substantive law, are of a negative nature; and even in that point of view, are not "comprehensive," being subject to an artificial restriction as to the method of procedure (the jurisdiction of courts).

These definitions tell us "what a tort is not."[48] Moreover, by the qualification as to recovery by common law action, the scope of the term "tort" is confined by the limits within which the common law courts exercise their jurisdiction. But important liabilities, enforced by various other courts, lie outside of that jurisdiction. "According to the common understanding of words, breach of trust is a wrong, adultery is a wrong, refusal to pay just compensation for saving a vessel in distress is a wrong." Remedies in such cases have been enforced, respectively, in a Court of Equity, in an Ecclesiastical Court, or in an Admiralty Court. "But that which

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of which a tort is a violation, *are*, in fact, distinct from those arising out of contract. But they are also . . . *distinct from a vast array of other rights;* so that the usual definition is as defective as would be a definition of the horse as '*A class of animal independent of horned cattle.*'" In 1 JAGGARD, TORTS, 5, the author says: "Such a definition is like a definition of a horse as a quadruped."

[44] CLERK & LINDSELL, TORTS, 6 ed., 1.

The learned authors add: "In order, therefore, to discover what a tort is, we must examine the various kinds of action which the law has from time to time recognized, not on any systematic theory, but according to the dictates of experience and convenience, and eliminate from the list those which are dependent on contract."

[45] POLLOCK, TORTS, 2 ed., 4. "Many attempts have been made with varying success to define a 'tort.' The above definition of Mr. Pollock, while a negative one, seems to be least unsuccessful and unsatisfactory." 1 JAGGARD, TORTS, 2.

[46] JENKS, DIGEST OF ENGLISH CIVIL LAW, Book II, Part 3, § 722.

[47] MONAHAN, THE METHOD OF LAW, 106.

[48] "To that extent we know what a tort is not." POLLOCK, TORTS, 2 ed., 4.

is remedied in each case is not a tort" within the foregoing definitions.[49]

Other definitions are also open to criticism.

Sometimes the test is laid down, that "every tort involves an affirmative act"; "that to avoid committing a tort we need only to forbear." But this is not universally true. There may be torts of omission, as distinguished from torts of commission.[50]

Several authors have defined a tort as an infringement of a right *in rem*, as distinguished from a right *in personam* — a right *in rem* denoting a right which the possessor has and may enforce against the entire community, while a right *in personam* may be enforced against particular individuals only.[51]

But this is not a correct description of all torts. Professor Burdick says that, while "many, perhaps most, torts" are violations of a right *in rem*, yet "on the other hand many a tort is a violation of a right *in personam*."[52]

"By some writers a tort has been defined as the violation of a right *in rem*, giving rise to an obligation to pay damages. There is a tempting simplicity and neatness in this application of the distinction between right *in rem* and *in personam*, but it may be gravely doubted whether it does in truth conform to the actual contents of the English law of torts. Most torts undoubtedly are violations of rights *in rem*, because most rights *in personam* are created by contract. But there are rights *in personam* which are not contractual, and the violation of which, if it gives rise to an action for damages, must be classed as a tort. The refusal of an innkeeper to receive a guest is a tort, yet it is merely the breach of a non-contractual right *in personam*."[53]

So as to the right inherent in all members of the community to enjoy transportation by a common carrier. The right to be accommodated

[49] POLLOCK, TORTS, 10 ed., 5. See also 1 JAGGARD, TORTS, 5, 6, 12. SALMOND, TORTS, 4 ed., 2, 7.

[50] See BURDICK, TORTS, 2 ed., 4, 5; Professor Langdell, 1 HARV. L. REV. 131; Professor Corbin, 21 YALE L. J. 552–53; SALMOND, TORTS, 4 ed., §§ 162, 160, p. 558.

[51] FRASER, TORTS, 8 ed., 1; COLLETT, TORTS, 7 ed., 1; INNES, TORTS, § 6. See WALTER D. SMITH, MANUAL OF ELEMENTARY LAW, §§ 127, 128; 1 AUSTIN, JURISPRUDENCE, 3 ed., 46, 389, and vol. 2, 964.

[52] BURDICK, TORTS, 2 ed., 6. Compare PIGGOTT, TORTS, 5, 6, 12–14.

[53] SALMOND, JURISPRUDENCE, ed. 1910, 437. As to the action of tort against an innkeeper or carrier for breach of duty to keep goods safely; see BURDICK, TORTS, 2 ed., 7, 8.

at an inn, or to receive transportation at the hands of a common carrier, is not a right which is available against the world at large. It is enforceable only against certain determinate persons, *viz.*, those persons who profess to carry on these occupations.

"Thus we have a duty attached to the mere profession of the employment, and antecedent to the formation of any contract, and if the duty is broken, there is not a breach of contract but a tort, for which the remedy under the common law forms of pleading is an action on the case. In effect refusing to enter into the appropriate contract is of itself a tort." [54]

The difficulty in applying to this subject the tests of right *in rem* and right *in personam* is, that these phrases usually relate only to the number of persons *against whom* a right is enforceable. They do not describe the number of persons who possess the right; the number who can claim to enforce the right, the number to whom a duty is due. In the typical instance of the contract right of a promisee against a promisor, the right is vested only in a certain determinate person and is enforceable only against a certain other determinate person. But a right, though enforceable only against certain determinate persons, may be vested in (may be enforceable by) all other persons (all members of the community who manifest their desire to exercise it). Such a right may not be a right *in rem*. But Mr. Piggott well says that

"duties imposed on determinate persons toward the whole of the rest of the community" "may aptly be termed duties *in rem*." [55]

The violation of such "duties *in rem*" may constitute a tort, though the right violated is not a right *in rem*.[56]

The unsatisfactory nature of the common definitions of tort has repeatedly been conceded. They do not state what are "the common positive characteristics of the causes of action" that can be sued upon as a tort. And the reason for this failure is obvious.

[54] POLLOCK, TORTS, 10 ed., 556–57. And see BEALE, INNKEEPERS, §§ 281–82, § 70; and HUTCHINSON, CARRIERS, 3 ed., §§ 62, 963.

[55] PIGGOTT, TORTS, 14.

[56] The phrase "General Rights" (see *post*, quotation from Professor Wigmore) might be understood as including all rights which inhere in the community generally, whether such rights are available against all the world or only against certain determinate persons.

Assuming, as has been customary, that the general subject of tort is to include all the cases under all the sub-topics usually enumerated under this general head in the books, it must be admitted that there are no common affirmative characteristics.

Sir William Markby says:

"It seems to me impossible to escape from the conclusion that the word 'torts' is used in English law to cover a number of acts, having no quality which is at once common and distinctive. In other words, I believe the classification to be a false one."[57]

Mr. Monahan[58] says:

"Indeed, no one supposes that the heterogeneous topics grouped together in our law books under the heading 'torts' have any generic connexion."

In Clerk and Lindsell on Torts,[59] the learned authors say:

"It is impossible to define the general term otherwise than by an enumeration of particulars." ". . . It is impossible to lay down any general principle to which all actions of tort may be referred."

In Jenks' Digest, it is said:

"A tort, in English Law, can only be defined in terms which really tell us nothing. . . . To put it briefly, there is no English Law of Tort; there is merely an English Law of Torts, *i. e.*, a list of acts and omissions, which, in certain conditions, are actionable. Any attempt to generalize further, however interesting from a speculative standpoint, would be profoundly unsafe as a practical guide. . . . Particular torts are the only torts which there are; the typical or normal tort does not exist. . . . Evil as this state of affairs undoubtedly is, the evils of premature generalization might be even greater. English Law stumbled on her definition of contract by an accident of genius; for six hundred years she has been seeking in vain for a definition of tort."[60]

In the Harvard Law Review for November, 1916,[61] Mr. Jenks says:

"But of any substantive definition of a tort English Law is still innocent. It is at present only in the preliminary stage, in which it says, this act or that is a tort, this or that is not."

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[57] MARKBY, ELEMENTS OF LAW, 3 ed., § 713.

[58] THE METHOD OF LAW, 106.

[59] 6 ed., 1, 4.

[60] JENKS, DIGEST OF ENGLISH LAW, Book II, Part 3, Continued, Preface, xiv, xv (1910).

[61] Vol. 30, pp. 8, 9.

Professor Wigmore, impressed with the difficulties of definition, would drop the term "tort" as the title of the subject. He says:

"The first wish is that we might proscribe, expel, and banish the obnoxious term 'Tort' as the title of the subject. Never did a Name so obstruct a true understanding of the Thing. To such a plight has it brought us that a favorite mode of defining a Tort is to declare merely that it is not a Contract. As if a man were to define Chemistry by pointing out that it is not Physics nor Mathematics. No half-way measures will do; the name must go."

"Names enough could be found. Let us agree for the moment on 'General Rights.'"[62]

How can these difficulties of definition be obviated?

1. By discarding the former custom of grouping together under the general head of tort cases of fault and cases of liability without fault.

2. By recognizing the existence of the modern common law rule — that, generally, fault on the part of defendant is requisite to constitute a tort. If this view is carried out to its logical result, the use of the term tort would be confined to cases of fault, and cases of liability without fault would be classed under the distinct head of absolute liability. Then it would be possible to state a common affirmative characteristic of actionable torts.

The modern view as to the requisites of a tort has been stated distinctly and briefly by Professor Ames.

"The early law asked simply, 'Did the defendant do the physical act which damaged the plaintiff?' The law of today, except in certain cases based upon public policy, asks the further question, 'Was the act blameworthy?' The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril."[63]

"We have seen how in the law of crimes and torts the ethical quality of the defendant's act has become the measure of his liability instead of the mere physical act regardless of the motive or fault of the actor."[64]

The theory of torts is elaborately discussed in chapters 3 and 4 of Holmes on the Common Law. The old doctrine — that a man acts always at his peril and is always liable, irrespective of fault, for all consequences — the learned author treats as obsolete. He practi-

[62] 1 WIGMORE, SELECTED CASES ON TORTS, Preface, viii. Dated Sept. 1, 1911.

[63] 22 HARV. L. REV. 99.

[64] *Ibid.*, 100.

cally concedes that the general notion upon which liability is now founded "is fault or blameworthiness in some sense."[65] In other words, "the law does, in general, determine liability by blameworthiness."[66] The author also recognizes the fact that, in various situations, the modern law treats a man as acting at his peril; but he regards these cases as constituting exceptions to the modern general rule of non-liability in the absence of fault.[67]

Dr. Kenny, in his Cases on Torts,[68] in a note to the case of *Stanley* v. *Powell*,[69] says:

"This judgment in *Stanley* v. *Powell* affords elaborate illustration of the change which has passed over the English conception of the legal liability for Tort . . . at the present day, the idea of Culpability has become judicially associated with that of Liability for Torts. . . ."

Professor Whittier says that

"our law of tort has been changed from one of absolute liability to one in which for the most part recovery is based on culpability."[70]

Professor E. R. Thayer[71] speaks of

"the fundamental proposition of the common law which links liability to fault."[72]

Even those who think that the change from the old law was not completed until a quite recent date practically admit that it is now settled doctrine in the courts.[73]

Those who adopt the modern rule that fault is, generally, requisite to a tort, admit that in some exceptional cases the law, acting upon considerations of public policy, imposes liability where

[65] Page 107.

[66] Page 108.

[67] Pages 112, 115–19, 145, 158, 159, 161.

[68] Page 146.

[69] [1891] 1 Q. B. 86.

[70] 15 HARV. L. REV. 336.

[71] 29 HARV. L. REV. 815.

[72] Mr. Austin's view amounts to this: that unlawful intention or unlawful inadvertence is a necessary ingredient in injury or wrong; that legal liability ought only to be based upon fault. 1 AUSTIN, JURISPRUDENCE, 3 ed., chapters XXIV, XXV, XXVI: especially pp. 474, 484, 485, 492, 504, 515.

See Judge Holmes' explanation of the reason why Mr. Austin adopted the above view. HOLMES, COMMON LAW, 81, 82.

[73] See 27 HARV. L. REV. 239, referring to Prof. J. P. Hall, 19 JOURNAL POL. ECON. 698.

there is no fault. But it does not follow that such exceptional cases should be classed under the general head of tort. Jurists, who adopt the theory that fault is requisite to a tort and carry it out to its logical result, would no longer divide all causes of personal action into contract and tort, including under tort everything that is not contract. On the contrary they would divide causes of personal action into three main classes. (1) Breach of genuine contracts. (2) Tort in the sense of fault.[74] (3) A third class comprising cases of so-called "absolute liability," *i. e.*, cases where there is neither breach of genuine contract or fault, and yet liability.[75]

The above suggested third class would not be made up entirely of (would not include only) cases heretofore placed under the general head of torts, but which can no longer be so classified if tort is to be regarded as requiring fault. Such cases would be placed at one end of the third class. At the other end would be the cases heretofore frequently spoken of as though they belonged under contract rather than tort; cases where, under the old forms of action, a remedy, with the help of fiction, was allowed under an action of contract, and many of which were often described by the unfortunate name of quasi-contracts.

"Absolute," the term used by Salmond, is not literally correct. Pollock[76] uses the expression "all but absolute." Professor Wigmore[77] says that the principle of acting at peril

"has certain limitations; and a special group of cases attempt to determine how far extraordinary catastrophes or the acts of third persons relieve from responsibility one who would ordinarily be 'acting at peril.'" [78]

Why not describe "the third class" as "liability imposed or created by law"? Because *all* liabilities that are not statutory (*i. e.*, founded on breach of statute) are "imposed by law" in the sense of being imposed by decisions of courts. This statement is not confined to tort liability. Professor Langdell[79] says:

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[74] The law does not allow an action in *all* cases of fault. In exceptional instances the law grants immunity, notwithstanding the presence of fault.

[75] Dr. Bishop might say that one practical result of the recognition of this third class is, that the term tort, instead of including everything that is not a breach of contract, becomes a sub-title "in the non-contract law." See BISHOP, NON-CONTRACT LAW, § 5.

[76] ESSAYS IN JURISPRUDENCE AND ETHICS, 119; TORTS, 10 ed., 518.

[77] 8 HARV. L. REV. 389.

[78] Compare POLLOCK, TORTS, 10 ed., 513 *et seq.*

[79] 1 HARV. L. REV. 56, note 1.

"Strictly, every obligation is created by the law. When it is said that a contract creates an obligation, it is only meant that the law annexes an obligation to every contract. A contract may be well enough defined as an agreement to which the law annexes an obligation."

And Professor Corbin says:

"All enforcible obligations are created by the law."[80]

It is reasonably certain that the former separation of causes of personal action into only two divisions (contract and tort) does not represent the state of the law at the present time. It may safely be asserted that the differences or distinctions heretofore pointed out between class 2 (Tort in the sense of fault) and class 3 (Absolute Liability) actually exist. The question is, whether the existence of these differences should be formally recognized in legal nomenclature and classification.[81]

Mr. Salmond, in his work on Torts, states it as the general rule that fault is requisite to liability for tort. But he follows the old method of classifying under the general head of torts the exceptional cases where the law imposes liability in the absence of fault, instead of placing them in a "third class" such as we have suggested.

Mr. Salmond's general views appear in the extracts quoted in the note below.[82]

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[80] 21 YALE L. J. 552.

[81] The separation between the two classes is clearly brought out in Pollock's "analytical classification of the grounds of liability in torts." POLLOCK, TORTS, 10 ed., 19–20. In three of his five divisions (*a*, *b*, and *d*) fault is an essential element. In the other two (*c* and *e*) it is not so.

Sir Frederick Pollock, in the article on torts, in 14 ENCYCLOPÆDIA OF LAWS OF ENGLAND, 2 ed., 140 (after giving classification by categories of rights), says: "Liabilities in tort may also be divided, from the defendant's point of view, into those which arise from a wilful act (this is by no means the same as a consciously wrongful act) such as trespass, or the omission of a positive duty; those which arise from want of due care and caution in the doing of something not unlawful in itself by the defendant, or by a person for whose acts he is answerable; and those which are imposed, irrespective of any particular act or default of the defendant or his servants, by some special rule of law."

Robert Campbell, in PRINCIPLES OF ENGLISH LAW, 416 (1907), classifies Obligations *Ex Delicto* (Torts) as follows: "1. The obligation absolute to avoid causing damage to another. 2. The obligation to take care so as to avoid causing damage to another. 3. The obligation to refrain from intentional acts which cause damage to another."

[82] "Section 2. — The General Conditions of Liability.

"1. In general, though subject to important exceptions, a tort consists in some act done by the defendant, whereby he has wilfully or negligently caused some form of

In the subsequent discussion as to what will constitute "fault" (*i. e.*, the fault which the foregoing authorities regard as generally a requisite element in an actionable tort), we are assuming the existence of damage. In other words, we assume that the defendant's conduct has caused to plaintiff damage of a kind that the law will notice, damage for which the law will afford redress whenever the person inflicting it can be deemed a tortfeasor. We are not concerned here to consider the exact nature of the damage which the law will notice. The two questions of damage and of responsibility for damage — (1) Has there been damage? (2) If so, was that damage tortiously inflicted? — are entirely distinct from each other.[83]

If the term tort is to be used only in the sense of fault, and cases of acting at peril, etc., are no longer to be grouped under tort, but are to be placed in the third class, how shall we define fault? What is the test of the fault which would then be requisite to constitute an actionable tort? [84]

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harm to the plaintiff. That is to say, liability for a tort is commonly based on the co-existence of two conditions: (*a*) damage suffered by the plaintiff from the act of the defendant; (*b*) wrongful intent or culpable negligence on the part of the defendant." SALMOND, TORTS, 4 ed., 8.

"Section 3. — Absolute Liability.

"1. The rule that *mens rea* in one or other of its two forms — wrongful intent or negligence — is an essential condition of civil liability for a tort, is subject to important exceptions. These exceptional cases in which liability is independent of intention or negligence may be conveniently distinguished as cases of *absolute* liability. . . .

"All cases of absolute liability may be divided into three classes:

(*a*) Liability for inevitable accident;

(*b*) Liability for inevitable mistake;

(*c*) Vicarious liability for the wrongful acts of others." SALMOND, TORTS, 4 ed., 14–15.

[83] See 1 SHEARMAN & REDFIELD, NEGLIGENCE, 6 ed., § 4. Professor Wigmore, 8 HARV. L. REV. 203.

[84] "To be of any service as a test of liability, fault must be used in its actual, its subjective meaning of some conduct repugnant to accepted moral or ethical ideals or some act or omission falling below the standard of conduct required by society of its members. It is possible to state all liabilities in terms of fault, to say that one is legally, if not morally or socially, in fault, wherever the law holds him liable. But this is reasoning in a vicious circle. It involves as the premise, the assumption of the very point in dispute, that legal liability cannot exist without fault. The reasoning is this, there can be no legal liability without fault, the defendant is liable, therefore he is at fault, if not actually at least legally. Not only is such reasoning vicious as reasoning, but, by confounding liability and fault, it destroys all value of fault as an element determinative

What conduct will constitute a *primâ facie* tort, *i. e.*, a tort, unless a justification is made out? [85]

Our description of the fault which is a requisite of "tort in the sense of fault" is — conduct which involves either culpable intention or culpable inadvertence.[86]

Assuming the above definition of fault, our definition of tort, so far as concerns the ethical quality of the defendant's conduct, closely resembles Mr. Austin's view. He says, in substance, that, to constitute a tort, there must be either culpable intention or culpable inadvertence.[87]

For a fuller definition, including the two elements of wrong and damage (at least something which the law will regard as damage), we should say:

There is a *primâ facie* tort (that is, a tort in the absence of special circumstances establishing a so-called justification):

If defendant by his conduct (other than mere breach of contract) (1) intentionally or negligently inflicts actual damage on plaintiff,[88] or (2) intentionally infringes a right of plaintiff without causing actual pecuniary damage.[89]

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of liability." Professor Bohlen, 59 U. PA. L. REV. 313. And compare BOHLEN, CASES ON TORTS, Preface, v.

[85] When a defendant in an action of tort is said to have proved a justification, he has in reality proved, not that he has committed an excusable wrong, but that he has not committed any wrong at all. Speaking literally, "there is no justification for a tort. The so-called justification is an exceptional fact which shows that no tort was committed." Stevenson, V. C., in Booth *v.* Burgess, 72 N. J. Eq. 181, 188, 65 Atl. 226 (1906). Compare Prof. A. V. Dicey, quoted in 20 HARV. L. REV. 356.

[86] In HEPBURN, CASES ON TORTS, Introduction, 21, 22, the learned editor divides torts into two classes: (1) "Torts through Acts of Absolute Liability; (2) Torts through Acts of Conditional Liability." (1) Includes "Trespasses and Absolute Torts other than Trespasses." (2) Includes "Torts through Negligence, and Torts through Act of Intentional Harm."

[87] See *ante*, n. 72, references to AUSTIN, JURISPRUDENCE.

[88] *I. e.*, actual damage of a kind recoverable in a court of common law jurisdiction.

[89] The intentional infringement of a right, though not causing actual pecuniary damage, may sometimes afford ground for an action of tort. The plaintiff recovers only nominal damages, and the real purpose of the suit is generally to establish his legal right. See MARKBY, ELEMENTS OF LAW, 3 ed., § 706, note 3, and § 762; HOLMES, COMMON LAW, 98, 153–54; POLLOCK, TORTS, 10 ed., 13–16.

"But this principle is not, as a rule, applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury." Bowen, L. J., in Brunsden *v.* Humphrey, 14 Q. B. Div. 141, 150 (1884). "In cases of negligence there is no such invasion of rights as to entitle a plaintiff to recover

That the intentional infliction of damage constitutes a *primâ facie* tort is a position strongly sustained by the following citations:

"At Common Law there was a cause of action whenever one person did damage to another wilfully and intentionally, and without just cause or excuse." [90]

"Now, intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that person's property or trade, is actionable if done without just cause or excuse." [91]

"*X*, who intentionally causes *damage* to *A*, has *primâ facie* done an *injury* or wrong to *A*, and if *X* can show no legal justification for the damage he has thus intentionally done to *A* he is liable to an action by *A*." [92]

"It has been considered that, *primâ facie*, the intentional infliction of temporal damage is a cause of action, which, as a matter of substantive law, whatever may be the form of pleading, requires a justification if the defendant is to escape." [93]

"It is submitted that the discussion would be materially simplified if it were understood that all damage wilfully done to one's neighbor is actionable unless it can be justified or excused." [94]

"The wilful causing of damage to another by a positive act, . . . is a tort unless there was just cause for inflicting the damage. . . ." [95]

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at least nominal damages. . . ." Sheldon, J., in Sullivan *v.* Old Colony Street R., 200 Mass. 303, 308, 86 N. E. 511 (1908). One who unintentionally, though carelessly, interferes with plaintiff does not do so under an assertion of a right. It is generally held that negligent conduct is not actionable, unless it has occasioned actual damage. See SALMOND, TORTS, 4 ed., 186; POLLOCK, TORTS, 10 ed., 194; 1 SEDGWICK, DAMAGES, 9 ed., § 96 *et seq.*; 15 COL. L. REV. 8, 9; 20 HARV. L. REV. 262–63, 356; 2 AMES & SMITH, CASES ON TORTS, ed. 1909–10, chap. IV, § VII; 21 HALSBURY, LAWS OF ENGLAND, 481.

[90] Bowen, L. J., Skinner *v.* Shew, [1893] 1 Ch. 413, 422.

[91] Bowen, L. J., Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 613 (1889).

[92] Prof. A. V. Dicey, 18 L. QUART. REV. 4.

[93] Holmes, J., Aikens *v.* Wisconsin, 195 U. S. 194, 204 (1904). And see Judge Holmes, in 8 HARV. L. REV. 9.

[94] POLLOCK, TORTS, 7 ed., 319. See also 22 L. QUART. REV. 118.

[95] Professor Ames, 18 HARV. L. REV. 412.

"In our judgment the Common Law is coming, if it has not already come, to hold that a man who wilfully or negligently causes temporal damage of any kind is liable unless he can show justification or excuse. The real difficulty is not to find a verbal definition of tort in general, but to define the substantial principles of justification and excuse and the limits of their application." 26 L. QUART. REV. 421.

Compare Stevenson, V. C., in Booth *v.* Burgess, 72 N. J. Eq. 181, 198, 65 Atl. 226 (1906).

As to the distinction between intent and motive, see the discussion in a former paper by the present writer.[96]

If the term tort is used to describe only cases of fault, will it include *all* cases of damage caused by negligence in the legal sense of that term?

Negligence — in the sense of failure to use due care under the circumstances — generally implies fault on the part of the defendant. But there is an exceptional situation, where it is possible for a man to be held negligent in law, although personally he is not in fault.

The courts have established an arbitrary standard of care, an external standard, *viz.*, the care which would be exercised under similar circumstances by an average reasonable man, a man of average prudence. If a man, without being *non compos* or without being subject to certain kinds of distinct incapacity, is yet below the average so that he cannot exercise the foresight and care of an average reasonable man, he is held liable for damage due to his failure to exercise such foresight and care, although he has, in fact, done the best he knew how. The courts "decline to take his personal equation into account"; in other words, the law "leaves his idiosyncrasies out of account." This view is fully stated in Holmes on the Common Law.[97] "The rule," says Judge Holmes,[98] "that the law does, in general, determine liability by blameworthiness,

[96] "Crucial Issues in Labor Litigation," 20 HARV. L. REV. 253, 256–59. In one "specific tort," Malicious Prosecution, proof of intentional infliction of damage is not enough to make out a *primâ facie* case. Plaintiff must go further and prove bad motive on defendant's part. As to the reason for this exceptional rule, see Lord Herschell, Allen *v.* Flood, [1898] A. C. 1, 125. Whether an act, otherwise lawful, becomes actionable by proceeding from a bad motive, is a subject much discussed of late years. The question is sometimes stated in the following form: Whether the existence of bad motive will destroy an otherwise sufficient justification, grounded on self-interest?

See elaborate discussion by Professor Ames, in 18 HARV. L. REV. 411–22: "How far an act may be a Tort because of the Wrongful Motive of the Actor." Compare views expressed by the present writer, more favorable to defendants, in 20 HARV. L. REV. 453–55.

In 27 ENCYCL. BRIT., 11 ed., 65, Sir F. Pollock, as to the general proposition that motive is immaterial, says: "Only two exceptions are known to the present writer — malicious prosecution, and the misuse of a" (conditionally?) "privileged occasion."

[97] Pages 108–11. See also Holmes, J., in Comm. *v.* Pierce, 138 Mass. 165, 176 (1884); HOLLAND, JURISPRUDENCE, 8 ed., 98–101; 1 STREET, FOUNDATIONS OF LEGAL LIABILITY, 96.

[98] THE COMMON LAW, 108.

is subject to the limitation that minute differences of character are not allowed for."

The decisions in an infinite majority of the cases where men are held liable for negligence are undoubtedly based on personal shortcoming, *i. e.*, actual fault on the part of the defendant. The instances are believed to be very rare where a man who had exercised all the care of which he was capable has been found negligent on the ground that he did not exercise an amount of care which he was incapable of exercising; in other words, that he was unable to attain the external standard established by the law.[99] We think it best that *all* cases of liability for negligence, in the legal sense, should be classed under tort, with the accompanying explanation that, in a few exceptional cases placed under this head, liability is imposed in the absence of personal fault.

(To be continued.)

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[99] The record, as usually made up, would not show when liability was imposed upon this ground.